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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 519

NICHOLAS VISCARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 527

VINCENT PACELLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 603

JOSEPH ARMONE AND STEPHEN GRAMMAUTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 363 F. 2d 385.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1966. The petitions of Armone and Grammauta for rehearing were denied on July 28, 1966. On August 10, 1966, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari on behalf of Pacelli and Viscardi to September 6, 1966. On August 26, 1966, the time for filing the joint petition of Armone and Grammauta was extended to September 26, 1966. Viscardi's petition was filed on September 3, 1966; Pacelli's on September 6, 1966; and the petition on behalf of Armone and Grammauta was filed on September 26, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a prejudicial variance between the indictment's allegations concerning an overt act and the proof at petitioners' trial.

2. Whether the trial judge's instruction regarding the statutory inference of 21 U.S.C. 174 constituted an impermissible comment on Pacelli's and Armone's failure to take the witness stand.

3. Whether petitioner Pacelli was deprived of an unbiased jury because of three newspaper articles published four months before trial and a story which appeared in a magazine during trial.

4. Whether petitioner Viscardi was deprived of the effective assistance of counsel because his retained attorney, who assured the court that there was no conflict of interest, also represented three co-defendants.

5. Whether petitioner Armone was deprived of a

fair trial when the district court ordered the trial to continue and denied a motion for severance notwithstanding petitioner's ill health.

6. Whether the testimony of an accomplice was admitted under proper instructions.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense * * * the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on a one-count indictment charging them with conspiring to violate the federal narcotics laws (21 U.S.C. 173 and 174) by importing and selling narcotics. The following sentences of imprisonment were imposed: Viscardi—5 years; Grammauta—8 years; Armone—15 years; Pacelli—18 years. Armone and Pacelli were also fined $20,000 each. The court of appeals affirmed.

The evidence showed that from 1956 to 1960 petitioners and others[1] were engaged in a conspiracy to import huge amounts of heroin from France for distribution in New York City. Among the couriers of the three principal exporters were a French seaman (R. 196a–218a), a pilot and steward employed by Air France (R. 102a, 245a–277a), and several diplomats, including the Guatemalan Ambassador to the Benelux countries (R. 263a). The heroin was usually delivered in the United States to co-conspirator Joseph Cahill (R. 197a–200a, 247a). In June 1958, Charles Hedges (the main prosecution witness) was employed by Cahill to accompany him as he received a shipment from the airline pilot (R. 87a). The parties travelled from their homes to the vicinity of Rockefeller

[1] Petitioners and eight others were indicted by the grand jury and charged with conspiring among themselves and with sixteen unindicted co-conspirators unlawfully to import narcotics from France and distribute them in the United States. Alfred Armone and Alexander Schoenfeld, two defendants, who were tried with petitioners, were acquitted.

Center, where Hedges observed Cahill meet a French courier and obtain from him a package of narcotics (R. 87a). Cahill gave the courier an envelope containing money (R. 88a). Hedges was then told to deliver the package to Cahill's home (R. 89a). After that incident, and until November 1959, Hedges was regularly employed by Cahill to receive packages of narcotics from the couriers and to deliver them to domestic wholesalers (R. 90a–150a). After a brief period of inactivity, Hedges resumed his employment in January or February 1960, until October 1960, when Nicholas Calamaris, another co-conspirator whose duties were the same as Hedges, was arrested (R. 171a–172a).

Petitioner Pacelli was one of the wholesalers who received his narcotics from Cahill. In September or October 1958, Hedges was introduced to Pacelli, who was advised, "We are going to have Charlie [Hedges] deliver up to you. So you pay him on your side and we will take care of him on our side" (R. 111a). From then on, Hedges received $200 per delivered kilogram package, half of which was paid to him by Pacelli (R. 111a–112a). On occasions when delivery was made by transferring a package from the trunk of one car to the trunk of another, Pacelli furnished one of the vehicles (R. 117a–118a). Whether Hedges transported Pacelli's deliveries to Pacelli personally or to his agents, he was generally paid by Pacelli or co-conspirator Michael Ricucci, another domestic wholesaler who worked with Pacelli (R. 126a, 139a, 154a, 155a, 170a).

Petitioner Joseph Armone provided some of the funds to import the narcotics, and he directed their disposition. Hedges turned the money received from the domestic wholesalers over to Armone, who used it to make further acquisitions of narcotics (R. 131a, 151a). In late 1959 or early 1960, Pacelli asked Hedges to secure three kilograms of heroin. Hedges reported the request to Armone, who expressed reluctance to fill Pacelli's order because he had not been prompt with his payments. At Hedges' urging, Armone relented. One half-hour later, Armone advised Hedges that he had arranged to fill Pacelli's order (R. 150a–151a). In April or May 1960, Hedges told Armone that he wanted more money because he was assuming a disproportionate share of the risk. Armone consented to a raise. From then on, Hedges received $150 from Armone and $100 from Pacelli per delivered kilogram (R. 158a–159a).

Petitioner Viscardi's role in the conspiracy was to store the narcotics for the importers until needed (R. 100a). Hedges had several dealings involving Viscardi. In June 1959, he accompanied petitioner Grammauta, who served as an assistant to Armone and the other importers (R. 131a, 143a), to Viscardi's house, where Grammauta retrieved a 6-to-10 pound package of heroin for delivery to Pacelli's agent, Carmine Guanti (R. 140a–141a). In August 1959, Hedges, Cahill and co-defendant Alfred Armone removed two suitcases containing narcotics from a locker in a train station and delivered them to Viscardi's house (R. 141a–142a). During the latter part

of 1959 and early 1960 Hedges procured various amounts of heroin from Viscardi and delivered them to Guanti. He received payment from either Pacelli or Guanti (R. 146a–147a).

ARGUMENT

1. The indictment listed 11 overt acts alleged to have been committed by various conspirators in furtherance of their illegal plan (R. 25a–27a). Overt act 10 alleged (R. 27a):

> In further pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1960 * * * the defendant Joseph Armone was in the vicinity of 122 Second Avenue, New York, New York.

In response to a motion for a bill of particulars, the government alleged that this overt act was committed "[d]uring March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M., inside 207 Second Avenue, New York City" (R. 54a, 529a). At trial the government's evidence showed that in April or May 1960, at Lulu's Bar, 207 Second Avenue, Joseph Armone complained to Hedges that he had been given a counterfeit $100 bill by Hedges' friend, Godwin (R. 164a–165a).

Because of the statute of limitations, the trial court in his closing instructions ordered the jury to disregard the first nine overt acts described in the indictment and stated that "your task will be to find beyond a reasonable doubt that at least one of the overt acts 10 or 11, in fact, took place after Sep-

tember 30, 1959" (R. 453a–454a).[2] The court then read overt act 10 and commented (R. 454a):

> As I recall the evidence here—and I say it is your recollection that controls, and not mine—overt act number 10 refers to the conversation alleged to have taken place between Joseph Armone, Hedges, and Godwin [an unindicted alleged co-conspirator] concerning the counterfeit $100 bill. As I recall it, Hedges said that Joseph Armone was concerned about the counterfeit bill, concerned about the trouble that it would cause.

Then the court recited overt act 11, which dealt with a delivery of a package containing narcotics by co-conspirator Frank Sherbicki to Hedges in June 1960. The court instructed that it was essential for the jury to find that either overt act 10 or 11 had been committed in order to convict (R. 455a).

Following several hours of deliberation the jury requested that the testimony relating to overt acts 10 and 11 be read to them (R. 522a). The pertinent portions of the transcript were selected with the approval and cooperation of all counsel (R. 522a–526a). After first reminding the jury that the indictment was not to be considered as evidence, the court ordered the reporter to read the selected testimony (R. 526a–527a). Counsel for Viscardi requested that the government's bill of particulars be read. This was denied by the

[2] Although the indictment alleged that overt act 9 was committed during the limitations period, the court eliminated that act from the jury's consideration because the government's evidence failed to establish unequivocally that the act in question was committed at the time alleged (R. 453a–454a).

court, who remarked that the difference between the location set forth in the indictment and in the bill of particulars was not a fatal variance (R. 527–528). Thus as to overt act 10 the jury heard only the trial testimony relating to the counterfeit $100 bill. Following some further deliberation the jury submitted this request (R. 528–529):

> First, count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960. When the request was made this afternoon to rehear count 10 testimony, we heard testimony that occurred at Lulu's Bar and the luncheonette across the street from Lulu's. These two locations are five blocks, approximately, apart.
>
> Can 122 Second Avenue be thought of as the vicinity of 122 Second Avenue or is it the location of another separate event?

The judge permitted each counsel to comment on the question in closed session. Then, over the objection of defense counsel, he instructed the jury that the term "vicinity" had no rigid legal definition (R. 538a):

> You have done very well, because everything you say here is exactly the truth. Overt act No. 10 does refer to the vicinity of 122 Second Avenue. That is what the indictment says. The testimony you heard did refer to Lulu's Bar and the restaurant across the street. As you have indicated, they are some distance apart. But it is for you to determine, do you think that these two places, one is in the vicinity of the other? It is your judgment on that. There is no hard and fast rule. What

do you think? And I think that is about the only way that I can answer that.

The jury rendered its verdict on June 22, 1965. On July 8, the district judge summoned counsel to chambers and informed them that a mistake had been made with respect to overt act 10. The court had, since the trial, reviewed grand jury minutes and had learned that the grand jury did not hear evidence regarding the counterfeit bill, but that overt act 10 was based upon a conversation between Hedges and Joseph Armone at Lulu's Bar in March or April 1960, wherein Hedges was granted a pay increase of $50 per kilogram for each delivery (R. 551a). A hearing was held on July 29, 1965, at the conclusion of which the court denied counsel's motion to set aside the verdict and for a new trial. The court noted that the defense had been given Hedges' grand jury testimony and that defense counsel had participated with the government attorney in "culling" the testimony which was read in response to the jury's particularized request (R. 588a–589a).

There is no merit to the claim (Viscardi Pet. 12–14; Pacelli Pet. 38–40) that as a result of these circumstances petitioners were convicted on a charge different from that on which they were indicted. The indictment alleged a conspiracy in violation of 21 U.S.C. 174—a statute which does not expressly make the commission of an overt act an essential element of the offense.[3] Hence, any variance from the indictment as

[3] While the general conspiracy statute, 18 U.S.C. 371, requires the proof of an overt act, the narcotics conspiracy statute does not in terms require the doing of "any act to effect the object of the conspiracy." It has been suggested that, as is true of the

to the particular overt act presented to and found by the jury related to an immaterial detail of the proof.[4] And since petitioners were all well aware of the theory on which this overt act was being presented to the jury, the alleged variance could not have taken them by surprise or have affected their defense. The court below was therefore correct in rejecting petitioners' claim on the basis of *United States* v. *Negro*, 164 F. 2d 168 (C.A. 2); *Finley* v. *United States*, 271 F. 2d 777 (C.A. 5), certiorari denied, 362 U.S. 979; *Napolitano* v. *United States*, 340 F. 2d 313 (C.A. 1); *Culp* v. *United States*, 131 F. 2d 93 (C.A. 8). See also *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Cal.).

Moreover, the government's proof was sufficient to support overt act 11 as well as the particular overt act 10 which the grand jury intended (R. 158a–159a). Hence this is not a case in which the jury's verdict could be supported on no theory other than the one mistakenly presented to the jury. Since the grand jury testimony of Hedges was available to petitioners and they could have determined, just as the district judge did after the trial, that Hedges did not tell the grand jury about the incident involving the counterfeit $100 bill, the district court properly concluded

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conspiracy provisions of the Sherman Act (*Nash* v. *United States*, 229 U.S. 373, 378), no overt act need be proved to convict under 21 U.S.C. 174. See *United States* v. *Garfoli*, 324 F. 2d 909 (C.A. 7); *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Cal.).

[4] *Stirone* v. *United States*, 361 U.S. 212, on which petitioners rely, concerned a variance on an essential element of the offense charged in the indictment, and it is, therefore, inapposite.

that the mistake in which they participated could not be used by them as the basis for a new trial.

Nor is there any substance to the subsidiary claims relating to this incident. The court's instructions made it quite clear that the jury was unanimously to decide whether each of the two overt acts was supported by the evidence, and did not authorize a "non-unanimous verdict" (Pacelli Pet. 38, n. 33). The jury's question whether the location alleged in the indictment was in the "vicinity" of the site where the overt act occurred demonstrated alertness rather than "total confusion" (Pacelli Pet. 37). By leaving the resolution of that issue to the jury, the district judge was, as the court below observed (Pacelli Pet. App. 21a–22a), leaving to the jury an issue which should have been resolved by an instruction favorable to the government. *United States* v. *Ansani,* 240 F. 2d 216, 223 (C.A. 7), certiorari denied, *sub nom. Milner* v. *United States,* 353 U.S. 936. Hence the error if there was any, was favorable to petitioners. And finally, the contention of petitioners Armone and Grammauta that the discussion concerning the counterfeit $100 bill was not in pursuance of the conspiracy (Armone Pet. 37–40) was correctly rejected by the court below on the ground that the objectives of the conspiracy were still being pursued at that time and the jury could well have concluded that "Armone was attempting to stave off investigation of the conspiracy by warning Hedges of the dangers of passing counterfeit money among the conspirators" (Armone Pet. App. 27a).

2. In his closing instructions the trial judge recited the applicable provisions of 21 U.S.C. 173 and 174,

and said the following regarding the statutory inference (R. 444a):

> Section 174 further provides that if a defendant is shown to have had possession of the narcotic drug, such possession, unless the defendant explains the possession to your satisfaction, may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law.

Pacelli and Armone allege that the court's reliance upon the statutory language constituted an impermissible comment on their failure to testify (Pacelli Pet. 7–20; Armone Pet. 5, 45). In *United States* v. *Gainey*, 380 U.S. 63, 71, n. 7, this Court observed that "the better practice" in cases involving statutes of this kind would be to instruct the jurors that they may draw an inference unless the *evidence in the case* provides a satisfactory explanation, thereby avoiding any suggestion that the defendant is under an obligation to testify. In *Gainey* itself, however, this Court refused to reverse convictions on the basis of the charge given (380 U.S. at pp. 70–71):

> Furthermore, in the context of the instructions as a whole, we do not consider that the single phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury" can be fairly understood as a comment on the petitioner's failure to testify. Cf. *Bruno* v. *United States*, 308 U.S. 287. The judge's overall reference was carefully directed to the evidence as a whole, with neither allu-

sion nor innuendo based on the defendant's decision not to take the stand.

Petitioners contend that the district judge's instructions here were less circumspect in this regard than the instructions in *Gainey*. This claim is refuted, we submit, by a reading of the instructions as a whole (R. 437a–493a, 510a, 514a–522a, 526a–528a, 538a–539a). The jury must have considered the instructions regarding the statutory inference of knowledge of illegal importation in the context of the format used throughout the remainder of the instructions. In summarizing each defendant's theory of defense, for example, the court stated the defenses as if they had come from the defendant's lips, even with respect to those who had not taken the stand (see R. 458a–475a). It must have been obvious to the jury that the judge could not have been referring to petitioner Pacelli's own testimony when he charged, for example, that "[t]he defendant Pacelli denies that the evidence shows that he was a member of the conspiracy" (R. 471a) since Pacelli did not testify. Similarly, we submit, the jury did not mistake the instruction that it might infer illegal knowledge "unless [the defendant] has given you a satisfactory explanation of his possession" (R. 444a) as a reference to the defendant's personal testimony or to a failure to testify.

Moreover, shortly before completing his lengthy instructions, the trial judge cautioned that while three defendants, including Viscardi and Grammauta, testified, they were not required to do so. As to the remaining defendants, the court stated (R. 485a–486a; emphasis added):

> The other defendants did not testify and you will not consider this as any evidence whatsoever against them *or as any basis of any presumption or inference unfavorable to them.* You will not permit this to weigh in the slightest degree against any of the defendants who did not testify nor should this matter enter into your deliberations. This is because the government must prove a defendant guilty beyond a reasonable doubt, a defendant is not required to prove his innocence.

Consequently, if the jury had mistakenly construed the earlier portion of the charge as imposing an obligation on petitioners to testify, the concluding part of the charge plainly dispelled such an interpretation. In these circumstances, the court below properly rejected petitioners' claim as "hypertechnical" (Pacelli Pet. App. 9a).

Nor is there substance to petitioners' claim that the trial judge's failure to define "may" and "infer," when stating that evidence of possession of the drug "may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation * * *" (Pacelli Pet. App. 6a), converted the inference to a conclusive presumption. No request was made at trial that the judge present a detailed explanation of these easily understood terms, and there is no reason to believe that the jury misunderstood their meaning. Moreover, in this case, where the evidence showed that importation of the narcotics and delivery to wholesalers was an essential part of the conspiracy, the statutory inference was not as indispensable to the government's case as may be true in the usual nar-

cotics offense. The circumstantial evidence alone, apart from the statute, would have supported a finding of illegal knowledge.

3. The question of publicity was handled with propriety. On January 11, 1965, four months before the trial began, the *New York Daily News* featured a story about a missing young woman. The woman was identified as a close companion of Pacelli. It was reported that Pacelli, "who trafficked in narcotics, was under surveillance at the time of her disappearance" (Pacelli Pet. App. 38a), and that the suspicious disappearance may have resulted from her association with Pacelli and her knowledge of his role in a vast "dope ring" (Pacelli Pet. App. 39a). Another article appeared in the inside pages of the *Daily News* on the following day (Pacelli Pet. App. 40a). A month before trial, the district judge asked the United States Attorney to request local news media not to publicize the trials (Pacelli Pet. App. 12a–13a).

At the commencement of *voir dire*, the court advised the prospective jurors (R. 66a):

> Now, ladies and gentlemen, in the past few weeks there have been newspaper, magazine, radio and television accounts dealing generally with the subject of narcotics, narcotic problems and various phases of it. Of course you must reach a verdict in this case solely on the basis of the evidence presented at the trial and you must not be influenced in any way by anything you may have read in the press or heard on the radio or television. So I would like to ask all of you at this time whether there is anything which you have read, heard or seen on the gen-

> eral subject of narcotics which would interfere with your ability to render a fair and impartial verdict and to reach your verdict solely on the basis of the evidence produced at the trial? Have any of you ladies and gentlemen, as far as you can recall, read anything in the press or heard anything on the radio or television relating to these charges that you have just heard this morning or relating to these defendants?

No prospective juror responded affirmatively to these questions. The court also admonished each juror not to read anything that could possibly relate to this case or to the subject of narcotics or organized crime. This admonition was repeated at the close of each daily session of the trial.

Trial commenced on May 3, 1965. Midway through the trial, there appeared in *Popular Science* magazine a six-page article entitled "The Dope-Smuggling Diplomats" (Pacelli Pet. App. 42a–47a). The article described a dope-smuggling ring which used diplomats as couriers. The pictures of seven co-conspirators appeared and Cahill's name was mentioned, but no reference to Pacelli or any of the defendants tried with him was made. After being informed of the magazine article, the court advised the jury (R. 300a):

> My attention has been called to a recent article in a magazine of national circulation, not one of the really popular ones that you know, but still a magazine of national circulation, which mentions the name of people who have testified at this trial and mentions some of the names of other people you and I have heard in the course

> of the trial. And since this has been brought to my attention, I would just like to ask each of you whether you have seen that article?
>
> Well now, if you should see it or if anyone should call it to your attention, I would be very grateful if you will not read it, but come and tell me about it, don't tell your fellow jurors. Please do not read it, but come to me and I will talk to you about it.

At the conclusion of the trial, the trial judge advised the attorneys that he was satisfied that "none of the jurors knew anything about this article or read it" (R. 589).

A reading of the judge's careful questioning of the jurors and their apparently frank answers and demonstrated concern for the importance of their duty to render a fair and impartial verdict convincingly supports the judge's conclusion that the jury was in no way prejudiced by three news articles published four months before trial. There is no reason to believe that anyone who might have read the *Daily News* articles could recall them and use them to prejudice any defendant's right to a fair trial. There is absolutely no evidence that any juror knew of or read the article embedded in a 226-page magazine whose total national circulation was less than 1½ million per month.[5] The publicity was not as flagrant as in the

[5] Pacelli's argument relies heavily upon the fact that the information contained in the magazine article emanated from a government source. Whether or not the explanation of the Federal Bureau of Narcotics (R. 589a–597a) supports Pacelli's allegation is not determinative of the central issue—the impartiality of the jury as affected by the pretrial publicity. *Sheppard* v. *Maxwell*, 384 U.S. 333; *United States* v. *Feldman*, 299

cases relied upon by petitioner and did not revolve about petitioner Pacelli, who was mentioned only indirectly in the *Daily News* article, and not at all in the magazine. Thus, the publicity could hardly have been said to be so intensive or extensive that the court could not believe the answers of the jurors and would be compelled to find bias as a matter of law. *Beck* v. *Washington*, 369 U.S. 541; *United States* v. *Costello*, 352 F. 2d 948 (C.A. 2), certiorari granted on another ground, 383 U.S. 942. See also *United States* v. *Marshall*, 335 F. 2d 999, 1005–1008 (C.A. 9), certiorari denied, October 10, 1966, Nos. 119, 120, O.T., 1966.

4. Petitioner Viscardi was represented at trial by an attorney who was also retained by three other defendants—Grammauta, Joseph Armone and Alfred Armone. On November 12, 1964, almost six months prior to trial, government counsel requested the court to inquire whether there was any possible conflict of interest. The following occurred (R. 56a–57a):

> The COURT: This case was on last week, was it not?
>
> Mr. JACOBS: That is correct, your Honor, this case was on on Monday and at that time the government stated it wished Mr. Lewis in court because the situation in this case is a novel situation, Mr. Lewis representing four defendants in a conspiracy case, and I wish the

F. 2d 914 (C.A. 2), certiorari denied, 370 U.S. 910; *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959. And there is no basis whatever in the record on which to rest an inference that the government intentionally sought to prejudice public opinion against these petitioners by releasing the information which appeared in *Popular Science* magazine.

Court to ask Mr. Lewis that if after being in this case now for over a month he knows of any conflict or any reason why he couldn't represent these four defendants.

The COURT: I assume he doesn't or he would have brought it to the attention of the Court.

Mr. LEWIS. That's right; I discussed it with my clients and they have advised me they feel there is no conflict.

The COURT: All right.

In the face of the assurances given by petitioner Viscardi's counsel, an attorney experienced in the trial of criminal cases, that there was no conflict and that the matter had been discussed with his clients, the court was not required to take further steps. Moreover, there is no factual support for the allegation that Viscardi's trial counsel gave him less than full representation. Sound reasons of trial strategy may have supported his failure to call certain character witnesses, and the brevity of his summation may have been intended to convey to the jury that there was little proof behind the prosecution's charges. Indeed, the same attorney spoke as briefly on behalf of co-defendant Alfred Armone, and the latter was acquitted. See *Lugo* v. *United States,* 350 F. 2d 858 (C.A. 9).

5. In January 1964, petitioner Armone had been shot in the left lower chest area (R. 361a). He was hospitalized for three months, but required occasional treatment thereafter for a chronic pancreatic abscess which had to be drained of the accumulation of pus (R. 362–363). When needed, two or three days of treatment would relieve the condition (R. 366a). The

trial of these petitioners started in May 1965, some sixteen months after the shooting. Twice during the trial the court acceded to requests for early adjournment to enable Armone to see his doctor (R. 232a, 284a). On June 8, after the government had rested its case, Armone's counsel advised the court that Armone was ill and could not attend the trial. The trial was adjourned to the afternoon of June 9 after a government doctor examined Armone at a hospital and reported that he felt Armone would be available on the following day (R. 336a–339a). On June 9 Armone came to court and a two-hour session was held. Defense counsel moved for a severance, asserting that Armone was physically unable to continue. The court denied the motion and indicated that he would carefully observe the defendant (R. 340–341a). The testimony that day consisted of a character witness for petitioner Viscardi and three witnesses called for the purpose of impeaching the credibility of Hedges (R. 432a).

On the following day the court was informed that the doctors would not permit Armone to attend the trial. A postponement until Monday, June 14, was thereafter ordered. Armone remained in the prison ward of Bellevue Hospital, where he received treatment. Armone was returned to the courtroom on Monday, June 14, with the consent of the resident in general surgery who was responsible for the patients in the prison ward at Bellevue (R. 547a). On that day defense counsel continued to protest that Armone was too ill to participate in his defense. The trial proceeded, and the court later conducted a hearing on

the question of Armone's health during which four doctors, including Armone's personal physician, testified, as well as Armone himself.

Before ruling orally on petitioner Armone's motion for a severance the district court summarized the testimony of petitioner and the doctors (R. 430a–431a) and reviewed the evidence which had been presented on the two days when Armone was allegedly in a "toxic" condition (R. 432a). The court concluded, "[U]nder all these circumstances I do not see that any prejudice has resulted to Mr. Joseph Armone and I, therefore, * * * will deny your motion for a severance" (*ibid.*). Petitioner contends that this amounted to a holding that a defendant is entitled to be present at his trial "only when unfavorable testimony is being adduced" (Armone Pet. 31). The district court's decision was based on no such proposition of law. The district judge subsequently made it entirely clear that he considered the impact of the testimony presented during Armone's illness (when he was of course physically present in court) as "a factor" (R. 433a), not that it was the sole ground of his decision. It was proper for the court, in making the discretionary decision whether to continue with the trial notwithstanding the illness of one of several defendants, to consider not only how incapacitating the illness was but how significant the testimony was to the charge against that defendant or to his defense. The ruling in this case, which rested on all the circumstances, was not an abuse of discretion. See *United States* v. *Bentvena,* 319 F. 2d 916, 932 (C.A. 2), certiorari denied, 375 U.S. 940; *United*

States v. *Shotwell Manufacturing Co.*, 287 F. 2d 667, 672 (C.A. 7), affirmed, 371 U.S. 341; *Stein* v. *United States*, 263 F. 2d 579 (C.A. 9); *Wellman* v. *United States*, 227 F. 2d 757, 776 (C.A. 6), vacated on other grounds, 354 U.S. 931.

6. Petitioners Armone and Grammauta challenge the rule in the federal courts that the uncorroborated testimony of an accomplice is sufficient to sustain a conviction. See *Holmgren* v. *United States*, 217 U.S. 509; *Caminetti* v. *United States*, 242 U.S. 470, 495; *Krulewitch* v. *United States*, 336 U.S. 440, 454; *United States* v. *Kelly*, 349 F. 2d 720, 767 (C.A. 2). This case warrants no exception to that rule. The testimony of Hedges was amply supported by four other co-conspirators and the documents and other exhibits introduced at trial. The evidence abundantly established a large narcotics conspiracy, involving many transactions and immense quantities of drugs and money. The jury's verdict, which found four of six accused guilty, was amply supported by the evidence summarized in our Statement, pp. 4–7, *supra*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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OCTOBER TERM, 1966

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Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON JOINT PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS ARMONE AND GRAMMAUTA

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I. The Issue as to Petitioner Armone's Illness During the Trial

(Replying to Br. in Opp. 20-23)

The Government at p. 21 of its brief states that "Armone was returned to the courtroom on Monday, June 14, with consent of the resident in General Surgery who was responsible for the patients in the prison ward at Bellevue (R. 547a)." From the record reference here given by the Government it appears that the Government is speaking of Dr. Richard J. Kostecki, whose testimony is printed in part at pages 546a-548a of the Joint Appendix. This reference by the Government to Dr. Kostecki's testimony is subject to objection for two reasons. *First,* Dr. Kostecki's testimony may not properly be referred to at all for the purposes of the within petitions for certiorari; as pointed out

in the joint petition for certiorari for Armone and Grammauta (pp. 17-18, 18 fn., 21 fn., 27, 28), neither the District Court nor the Court of Appeals took Dr. Kostecki's testimony into consideration, because that testimony was not received until after the District Court had already decided the motion for severance of Armone on medical grounds and indeed after the Jury had rendered its verdict. *Second*, the item from Dr. Kostecki's testimony which the Government has cited at p. 21 of its brief does not meaningfully support the Government's above quoted statement, because the page cited by the Government (R. 547a) indicates only that Dr. Kostecki did "release" Armone to come to Court on Monday, June 14, but when Dr. Kostecki was asked whether his release of Armone denoted that Armone was competent to understand the Court's proceeding, the question was limited to the situation on the preceding Wednesday, June 9 (R. 547a-548a).*

The Government's only reply to our contention that the District Court in effect held that a defendant is entitled to

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* Dr. Kostecki's testimony extends from R. 4293 to R. 4358. The portion printed in the Joint Appendix (R. 546a-548a) covers only the stenographic minutes at R. 4293-4297. Nowhere else in the lengthy testimony of Dr. Kostecki did he state that he considered Armone competent on Monday, June 14. The closest that Dr. Kostecki came to giving an evaluation of Armone's condition on Monday, June 14 was in answering a question by the Court at R. 4355-4356 in which Dr. Kostecki said that he did not think Armone was "toxic" at 8 A.M. Monday morning, June 14. We intend no disrespect when we say that this latter opinion of Dr. Kostecki is worthless in the light of his testimony as a whole, which we trust this Court may wish to examine if it should accept the Government's tender of the Kostecki testimony notwithstanding that both of the Courts below expressly disregarded it; as noted, the entirety of the Kostecki testimony appears at R. 4293-4358. The worthlessness of Dr. Kostecki's testimony emerges most dramatically when it is read also in the light of the testimony of his own aide at Bellevue Hospital, Dr. Donohue (Joint Pet. Cert. for Armone and Grammauta, pp. 20-25).

be present at his trial only when unfavorable testimony is being adduced, consists of an argument that this was not "the sole ground" of the District Court's decision, and that it was a proper part of the District Court's exercise of a discretionary function to consider, along with the question of how incapacitating the illness was, the question of "how significant the testimony was to the charge against that defendant or to his defense" (Br. in Opp. 22). These suggestions by the Government as to the extraordinary idea of depriving a defendant of the right to be *effectively* present at his own trial only when unfavorable testimony is received, does not reach the mark, either analytically or legally (constitutionally). If it is constitutionally wrong to deny a defendant this right of being present at his trial "solely" on the basis of some test as to the favorable or unfavorable character of the testimony, then it is just as wrong to deny this right *partly* on the latter basis. Furthermore, the Government's answer on this branch of the case apparently concedes, by silence, that in fact unfavorable testimony was received during Armone's undisputed illness; we have described heretofore what this unfavorable testimony was, and indeed how gravely prejudicial it was and how ardently the prosecutor at the trial used this unfavorable testimony—we refer to the testimony of Nicholas Calamaris, the prosecutor's cross examination of Calamaris having elicited answers unfavorable to an important alibi-type defense for Armone *per* the witness Costantino (Joint Pet. Cert. for Armone and Grammauta, pp. 16-17, 30-31).

Moreover, the Government's argument on this topic (Br. in Opp. 22-23) does not mention at all that the Court of Appeals totally (and inexplicably) ignored this matter of favorable versus unfavorable testimony received dur-